BEFORE THE STATE BOARD OF TAX APPEALS
STATE OF ARIZONA
Bank of America Tower
101 North First Avenue - Suite 2340
Phoenix, Arizona 85003
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JON & SANDY KARAS dba INVESTMENT
AUTO,INC.; KARAS GROUP, INC.,

Appellants,

Vs.

ARIZONA DEPARTMENT OF REVENUE,

Appellee.

Docket Nos. 1850-01-S
1851-01-S

NOTICE OF DECISION:
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The State Board of Tax Appeals, having considered all evidence and arguments presented, and having taken the matter under advisement, finds and concludes as follows:

FINDINGS OF FACT

The Arizona Department of Revenue (the "Department") audited Jon and Sandy Karas dba Investment Auto, Inc. and Karas Group, Inc. (collectively "Appellants," with the singular referring to Jon Karas) for the period January 1, 1993 through May 31, 1996 ("Audit Period"). Based on evidence, including Appellants' federal income tax returns and bank deposits for the Audit Period, the Department determined that Appellants were engaged in the business of selling tangible personal property at retail. The Department assessed Appellants transaction privilege tax, interest and penalties for late filling, late payment and negligence.

Appellants protested the assessment to an administrative hearing officer who granted the protest.

The Department's Transaction Privilege and Use Tax Division protested the hearing officer's decision to the Director of the Department. The Director vacated the hearing officer's decision and upheld the assessment. Appellants now timely appeal to this Board.

¹ The Department audited Jon and Sandy Karas dba Investment Auto for the period January 1, 1993 through December 31, 1994 and Karas Group, Inc. for the period January 1, 1995 through May 31, 1996.

, DISCUSSION

The issue is whether Appellants engaged in the business of selling tangible personal property.

Appellants bear the burden of proof as to all issues of fact. A.A.C R16-3-118. Appellants argue that they provide exempt personal services and are not taxable under the retail classification.

"The retail classification is comprised of the business of selling tangible personal property at retail." A.R.S. § 42-5061(A). "'Selling at Retail' means a sale for any purpose other than for resale in the regular course of business in the form of tangible personal property." A.R.S. § 42-5061(U)(3). A.R.S. § 42-5001(13) broadly defines a "sale" as "any transfer of title or possession, or both . . . by any means whatever . . . of tangible personal property or other activities taxable under this chapter, for a consideration"

Appellant was involved in the automotive retail business for over 25 years. In 1992, he left this field to pursue his own business interests which eventually incorporated into Karas Group, Inc. Appellant testified that he would meet with a potential buyer and discuss what type of vehicle the customer desired and what the customer was willing to pay for it. The customer would give Appellant money in advance, which included the cost of the vehicle plus Appellant's profit. Appellant would deposit the money into his bank account. Appellant would then locate potential vehicles through his contacts and use an auto dealer's license to purchase the vehicles tax free. Appellant would pay the seller for the vehicle out of his bank account and receive an open title, meaning the buyer was not specified, endorsed by the seller. Appellant would then give the open title to the customer.

Appellants argue that they are not taxable under the reasoning of Stillwell Grand Prix Motors v. City of Tucson, 168 Ariz. 560, 815 P.2d 929 (App.1991). Stillwell was a Tucson car dealership that participated in a European delivery program whereby persons who were planning to purchase a European automobile and who were also planning to take a trip to Europe, could order the car through Stillwell then pick it up and use it while in Europe. After the trip, the car would be shipped to the buyer in the United States. In the course of the transaction, Stillwell would receive the purchase price from the

 customer and record the transaction like any other sale then forward the payment to the seller after deducting its commission.

The Arizona Court of Appeals held that, because the activities of Stillwell did not include the transference of title or possession of the cars, they were not sales within the meaning of the Tucson City Business Privilege Code and were, therefore, not subject to the retail sales tax at issue. 168 Ariz. at 562, 815 P.2d at 931.

Because the Board finds that Appellants transferred title and possession of the vehicles at issue to customers, *Stillwell* is not applicable. Appellant admittedly held and then transferred open titles to his customers. Further, although Appellant testified that he rarely took possession of a vehicle and then only for a specific customer's convenience, evidence presented to the Board, including multiple advertisements and records documenting routine advertising charges, confirm that Appellant's possession of the vehicles was not infrequent.

A decision of this Board that Appellants rely upon is also inapplicable. See Ambassador Homes v. Arizona Dep't of Rev., No. 166-79-S (June 19, 1980). In Ambassador, the Board found that the taxpayer, which contracted with individuals to sell their used mobile homes, never took title or possession of the mobile homes and was acting as an agent of the individuals.

There is no evidence of an agency agreement between the sellers and Appellants in this case.

Further, in the transactions at issue, Appellants transferred "the title or possession, or both" of the vehicles to customers. Therefore, Appellants are taxable under the retail classification.

Appellants argue, in the alternative, that the Department is estopped from assessing the tax at issue because Appellant received oral information from the Department advising him that he was a consultant and that his services were not taxable. The Department may be estopped from assessing the taxes only if it committed acts inconsistent with a position it later adopts and Appellants relied on the Department and was injuried by the changed position. Valencia Energy v. Ariz. Dep't of Rev., 191 Ariz. 565, 959 P.2d 1256 (1998).

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It is unknown what information was provided by Appellant or how he described Appellants activities to the Department. Appellants arguments to this Board indicate that the information given to the Department was incomplete. In any event, Appellants have not shown that the Department gave them advice that was inconsistent with its audit position in this case. Therefore, the Department is not estopped from assessing the tax at issue.

Finally, Appellants have not shown that their failure to timely file returns and pay the tax at issue was due to reasonable cause and not willful neglect; therefore, the penalties at issue may not be waived. A.R.S. § 42-1125(A), (D) and (F). Because the interest imposed represents a reasonable rate on the tax due and owing and is made part of that tax by statute, it may not be abated. See A.R.S. § 42-1123; see also Biles v. Robey, 43 Ariz. 276, 30 P.2d 841 (1934).

CONCLUSIONS OF LAW

- 1) Appellants are liable for the tax assessed. See A.R.S. § 42-5061.
- 2) Appellants have not shown that their failure to timely file returns and pay the tax at issue was due to reasonable cause and not willful neglect; therefore, the penalties imposed may not be abated.
 A.R.S. § 42-1125(A), (D) and (F).
- 3) The interest imposed represents a reasonable rate on the tax due and owing and is made part of that tax by statute; therefore, it may not be abated. See A.R.S. § 42-1123; see also Biles v. Robey, 43 Ariz. 276, 30 P.2d 841 (1934).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the appeal is denied, and the final order of the Department is affirmed.

Docket Nos. 1850-01-S 1851-01-S This decision becomes final upon the expiration of thirty (30) days from receipt by the taxpayer, 1 2 unless either the State or taxpayer brings an action in superior court as provided in A.R.S. § 42-1254. 3 , 2001. DATED this 3rd day of August 4 STATE BOARD OF TAX APPEALS 5 6 William L. Raby, Vice-Chairman 7 WLR:ALW 8 CERTIFIED 9 Copies of the foregoing 10 Mailed or delivered to: 11 Ian A. Macpherson RYAN, WOODROW & RAPP, P.L.C. 3101 North Central Avenue, Suite 1500 Phoenix, Arizona 85012 13 Lisa A. Neuville Assistant Attorney General 14 Civil Division, Tax Section 1275 West Washington Street 15 Phoenix, Arizona 85007 16 17 18 19 20 21 22 23 24 25

Notice of Decision